UNITED STATES	)	
	)	**DEFENSE MOTION TO**
v.	)	**COMPEL DEPOSITIONS**
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 16 February 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 702(c)(2), the Defense requests that an oral deposition of the below listed individuals be conducted prior to trial.

a. CPT James Kolky, 1st Cavalry Division, Fort Hood, Texas, Brigade S-(b) (6) He will testify about his classification review of the three Apache gun videos that were sent to his Division by FORSCOM. Specifically, he will testify that the videos were not classified at the time of their alleged release. However, he will testify that he believes that videos should have been classified. He will also testify regarding his classification determination. The requested deposition is needed due to the Article 32 Investigating Officer's improper determination that CPT Kolky was not reasonably available at the Article 32 hearing. CPT Kolky was an essential witness and should have been produced in person at the Article 32 hearing. Additionally, given the fact CPT Kolky believes the matter that the Defense wishes to discuss with him is classified, the Government needs to arrange for a proper location for the deposition. The Defense requests that an oral deposition be conducted.

b. RADM Kevin M. Donegan, Director of Operations for United States Central Command, (b) (6) conducted classification reviews on two PowerPoint slide presentations of official reports originated by USCENTCOM. The PowerPoint presentations are the subject of Specification 10 of Charge II. RADM Donegan will testify regarding his classification determination and his belief of the impact on national security due to the release of the information. The requested deposition is needed due to the Article 32 Investigating Officer's improper determination that RADM Donegan was not reasonably available at the Article 32 hearing. RADM Donegan was an essential witness and should have been produced in person at the Article 32 hearing. Additionally, given the classified nature of his testimony, the Government needs to arrange for a proper location for the deposition. The Defense requests that an oral deposition be conducted.

c. Robert E. Betz, USCYBERCOM Chief Classification Advisory Officer, the Government has not provided the defense with contact information for Mr. Betz. Mr. Betz will testify

about his classification determination concerning the alleged chat logs between [redacted] and PFC Bradley Manning. Specifically, he will testify about his classification assessment of information discussed in the alleged chat logs. The requested deposition is needed due to the Article 32 Investigating Officer's improper determination that Mr. Betz was not reasonably available at the Article 32 hearing. Mr. Betz was an essential witness and should have been produced in person at the Article 32 hearing. Additionally, given the classified nature of his testimony, the Government needs to arrange for a proper location for the deposition. The Defense requests that an oral deposition be conducted.

d. LtGen Robert E. Schmidle, Jr., Deputy Commander U.S. Cyber Command, [redacted], is the Original Classification Authority (OCA) over the information discussed by Mr. Betz. LtGen Schmidle will testify that he concurs with the classification determination and impact statements made by Mr. Betz. The Defense would like to question him regarding his declaration and the basis for his belief. The requested deposition is needed due to the Article 32 Investigating Officer's improper determination that LtGen Schmidle was not reasonably available at the Article 32 hearing. LtGen Schmidle was an essential witness and should have been produced in person at the Article 32 hearing. Additionally, given the classified nature of his testimony, the Government needs to arrange for a proper location for the deposition. The Defense requests that an oral deposition be conducted.

e. [redacted] USCENTCOM, [redacted], MacDill Air Force Base, Florida [redacted] will testify concerning his classification review and classification determination concerning the CIDNE Afghanistan Events, CIDNE Iraq Events, other briefings and the BE22 PAX.wmv video. Specifically, [redacted] will testify concerning his classification determination and his belief of the impact on national security from having this information released to the public. The requested deposition is needed due to the Article 32 Investigating Officer's improper determination that [redacted] was not reasonably available at the Article 32 hearing. [redacted] was an essential witness and should have been produced in person at the Article 32 hearing. Additionally, given the classified nature of his testimony, the Government needs to arrange for a proper location for the deposition. The Defense requests that an oral deposition be conducted.

f. [redacted] The Government has not provided contact information for [redacted] will testify concerning his review of the disclosure of Department of State Diplomatic Cables stored within the Net-Centric Diplomacy server and part of SIPDIS. [redacted] will testify concerning his classification determination and the impact of the release of the information on national security. The requested deposition is needed due to the Article 32 Investigating Officer's improper determination that [redacted] was not reasonably available at the Article 32 hearing. [redacted] was an essential witness and should have been produced in person at the Article 32 hearing. Additionally, given the classified nature of his testimony, the Government needs to arrange for a proper location for the deposition. The Defense requests that an oral deposition be conducted.

g. (b) (6) D.W. [redacted], Joint Task Force – Guantanamo (JTF-GTMO), (b) [redacted] will testify concerning his review of the disclosure of five documents, totaling twenty-two pages. (b) (6) [redacted] will testify concerning his classification determination and his belief regarding the impact of the release of the information on national security. The requested deposition is needed due to the Article 32 Investigating Officer's improper determination that (b) (6) [redacted] was not reasonably available at the Article 32 hearing. (b) (6) [redacted] was an essential witness and should have been produced in person at the Article 32 hearing. Additionally, given the classified nature of his testimony, the Government needs to arrange for a proper location for the deposition. The Defense requests that an oral deposition be conducted.

h. Mr. Robert Roland. The government has not provided contact information for Mr. Roland. The requested deposition is needed due to Mr. Roland not being produced by the Government at the Article 32 hearing. Mr. Roland was an essential witness and should have been produced in person at the Article 32 hearing. Additionally, given the classified nature of his testimony, the Government needs to arrange for a proper location for the deposition. The Defense requests that an oral deposition be conducted.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 IO. The charges were referred without special instructions to a general court-martial on 3 February 2012.

5. The Defense began asking for the OCAs' classification determinations during discovery as early as 15 November 2010, approximately 14 months ago. *See* Attachment A. On multiple subsequent occasions, the Defense renewed its request for the OCAs' classification determinations. For over a year, the Government justified its need for excludable delay to the Convening Authority, in part, due to the requirement to obtain these OCA classification determinations. The Government provided these determinations to the Defense piecemeal. It

was not until the late fall (approximately November 2011) that the Defense had in its possession all of the OCA classification determinations. *See* Attachment B.

6. On 2 December 2011, the Defense submitted its witness list to the Article 32 Investigating Officer, naming the seven OCAs[1] as witnesses and explaining in detail the relevance of each of the OCAs' testimony. *See* Attachment C. That same day, the Government also submitted its witness list; it did not place any of the OCAs on its list. *See* Attachment D. On 7 December, the Government responded to the Defense's witness list. *See* Attachment E. With the exception of CPT James Kolky, the Government did not deny that the testimony of the OCA was relevant. Instead, the Government asked the Investigating Officer to find each OCA "not reasonably available for the Article 32 given his position as …". *Id.* at pp. 9-10. On 8 December 2011, the Defense submitted a "Witness Justification" memorandum to the Investigating Officer, wherein it challenged the Government's blanket averments that the OCAs were not reasonably available. *See* Attachment F. In particular, the Defense wrote at p. 5, "The government objected to the defense request for any of these witnesses. The government, without justification, requested that you find the requested witnesses were not reasonably available given the importance of their respective position. The government seems to argue that in matters of military justice, if you have too important a position, you should not be bothered. Military justice should not be controlled by the importance of your duty position. Each individual took the time to provide an unsworn affidavit. The defense should be provided with the opportunity to examine these witnesses at the Article 32 hearing." *Id.*

7. The Defense also objected to the Government's attempt to adduce the OCAs' unsworn statements in lieu of sworn statements at the Article 32. In this respect, the Defense argued:

> In the event these witnesses are not produced, the defense objects to the Investigating Officer considering their unsworn statements. R.C.M. 405(g)(4)(B). Unsworn statements under 28 U.S.C. § 1746 cannot be considered by the Investigating Officer. The Manual for Courts-Martial requires that testimony given at an Article 32 be under oath. R.C.M. 405(h)(1)(A). If a witness is deemed not reasonably available, the Investigating Officer can consider sworn statements. R.C.M. 405(g)(5)(B)(i). An unsworn statement provided under 28 U.S.C. § 1746 is not a sworn statement. In order for an unsworn statement provided under 28 U.S.C. § 1746 to be admissible, it must be subscribed and signed "in a judicial proceeding or course of justice" in order to subject the declarant to the penalty of perjury at the Article 32 hearing. *See* Article 131 c(3) (noting that "Section 1746 does not change the requirement that a deposition be given under oath or alter the situation where an oath is required to be taken before a specific person."); *See also* 28 U.S.C. § 1746 (noting that the unsworn declaration is not effective in "depositions or an oath of office, or an oath required to be taken before a specified official."). *Id.* at p. 5.

8. The Government did not respond formally to the Defense's position. Rather, the Government sent the Investigating Officer an email where it responded to miscellaneous matters. With respect to the sworn/unsworn statements, the Government wrote:

[1] At the time, there were seven identified OCAs. A subsequent OCA was requested as soon as his identity was known to the Defense.

> The United States objects to your consideration of Article 131, Perjury, as a reference in determining whether a statement is properly sworn. Article 131 is a punitive article intended to criminalize sworn statements by Servicemembers during a judicial proceeding. The original classification authority (OCA) reviews are simply sworn statements made "under penalty of perjury" IAW 28 U.S.C. 1746. Rather than Article 131, the United States recommends you consider Article 134, False Swearing, and specifically the portion under the explanation which states, "[i]t does not include such statements made in a judicial proceeding or course of justice, as these are under Article 131, perjury...." *See* MCM, part IV, paragraph 79c(1). Under the defense's proposed analysis, the only sworn statements that you could consider during this investigation, are previously sworn statements given under oath at an Article 32 investigation or court-martial. *See* Attachment G.

9. That same day, the Defense responded by email stating, "A declaration under 28 U.S.C. Section 1746 is an "Unsworn Statement." As such, unlike sworn statements under 2823, these statements are not admissible over defense objection unless signed during the Article 32 hearing. A plain reading of 28 U.S.C. Section 1746 and R.C.M. 405(h)(1)(A) undercuts the government's position. The analysis to Article 131 also reaffirms the defense's position." *See* Attachment H.

10. On 12 December 2011, the parties participated in an 802 conference to discuss various matters. The Investigating Officer had not, at this point, made any determination as to what witnesses would appear at the Article 32 hearing, even though the hearing was scheduled for a few days later. However, he had done independent research and provided the parties with several cases which showed that he was inclined to treat the unsworn statements as sworn statements for the Article 32. He asked the parties to respond to the cases he had found. The Defense looked up these cases and prepared a statement on why these cases were inapposite, sending this to the Investigating Officer and the Government later that day. In that email, the Defense wrote:

> 28 U.S.C. 1746 Statements
> In response to your request for us to look at 2010 WL 2265833 and 2002 WL 243445, the defense's position is that both cases are inapplicable to the situation at hand. In *Faison*, the IO found that TRD was unavailable and that her videotaped statement was sworn. Such a determination was appropriate given the fact TRD responded to questions indicating that she knew the difference between the truth and a lie and promised to tell the truth. As the IO and the AFCCA correctly concluded, this colloquy more than adequately satisfied the oath/affirmation requirement so as to make TRD's videotaped statement a sworn statement under R.C.M. 405(g)(4)(B)(i). In the instant case, unsworn statements under 28 U.S.C. § 1746 do not share any of the same hallmarks of a sworn statement. The statements are not made in front of anyone and the statements are not similar, in that they are not made in front of a person authorized to administer oaths.
>
> Likewise, *Elsevier* dealt with a videotaped interview that was done without a formal swearing or oath. However, it qualified as a sworn statement in accordance with R.C.M. 405(g)(4)(B)(i) since on a later date the unavailable witness did swear to the truth of the

statements contained therein. The IO correctly found this to be a sworn adoption of the videotaped interviews that, pursuant to *United States v. Wood*, 36 M.J. 651 (A.C.M.R. 1992), rendered it admissible. None of the individuals who provided the unsworn statements under 28 U.S. C. § 1746 have subsequently provided a sworn adoption of their unsworn statement in accordance with R.C.M. 405(g)(4)(B)(i).

An unsworn statement provided under 28 U.S.C. § 1746 does not qualify as a sworn statement. In order for an unsworn statement provided under 28 U.S.C. § 1746 to be admissible, it must be subscribed and signed "in a judicial proceeding or course of justice" at the Article 32 hearing. A plain reading of 28 U.S.C Section 1746 and R.C.M. 405(h)(1)(A) undercuts any argument to the contrary. *See* Attachment I.

11. The Government's one line response was, "The United States maintains its previously stated position on … the validity of the sworn statements." *See* Attachment J. The Investigating Officer did not ask the Government to respond specifically to the Defense's argument or to advance its own interpretation of the cases.

12. On 14 December 2011, the Investigating Officer ruled in favor of the Government on the unsworn statements. *See* Attachment K. In support of its ruling, the Investigating Officer produced three new cases that he believed supported the proposition the Government was advancing.[2] In making his ruling, the Investigating Officer stated, "I also note that the classification review statements at issue all indicate that they are in the "course of justice" as they all indicate the persons making the statements knew they were being prepared for use in this case. As such, I consider these statements to have the same indicia of reliability as sworn statements." *Id.* The last line of the Investigating Officer's ruling clearly reveals that he did not deem an unsworn statement made under penalty of perjury to be equivalent to a "sworn statement" under 405(g)(4)(B). Rather, he determined that an unsworn statement should be admissible because it carried with it "the same indicia of reliability as sworn statements." *Id.* The Defense's position was that the Investigating Officer fabricated a new ground upon which to admit statements under 405(g)(4)(B) – that the statement carries "the same indicia of reliability as sworn statements" – which is not permitted under military law.[3]

13. At the time the Investigating Officer had made the determination that the unsworn statements would admissible because they carried the same indicia of reliability as sworn statements, he had not yet even formally ruled on whether the OCAs were "reasonably available" or would be produced at trial. Clearly, the implication of the Investigating Officer's ruling on

[2] Only one of these was a military case; two were federal appellate cases. The defense maintains that none of the cases offers support for the proposition that an unsworn statement under 28 U.S. C. § 1746 can be converted into a sworn statement under R.C.M. 405(g)(4)(B). In fact, the only military case cited by the Investigating Officer, *United States v. Gunderman*, 67 M.J. 683 (C.A.A.F. 2009) appears to lend more support to the defense's position that that of the government/Investigating Officer. The Army Court of Criminal Appeals in *Gunderman* emphasizes that, "To be admissible before this court, factual assertions must be … admitted in a proper form …. Indeed, our own internal rules reflect this requirement for some form of solemnity." *Id.* at 686-7. The court continued, "By reaffirming this requirement, we do not exalt form over substance … However, assertions of *fact* … must either be contained in the record or be offered in an admissible form." *Id.* at 688. In short, *Gunderman* establishes that form is important and evidence proffered by either party must be "in an admissible form."

[3] Note that this determination by the Investigating Officer formed one of four bases for the Defense's Motion for the Investigating Officer to recuse himself. *See* Attachment M.

the unsworn statements meant that he had determined that they would not be required to appear – but he had yet to provide a basis for that ruling. Later that night, the Investigating Officer finally made his first (in a series) of witness determinations. He determined that the testimony of six of the seven OCAs was "relevant" but that the significance of the OCAs' expected testimony did not "outweigh the difficulty, expense and effect on military operations" so as to justify the OCAs' presence at the Article 32.[4] *See* Attachment L. He found the CPT James Kolky's expected testimony was not relevant to the form of the charges, the truth of the charges, or information necessary to make an informed recommendation. *Id.*

14. During the course of the Article 32 hearing, and after the Defense made a motion for the Investigating Officer to recuse himself,[5] the Investigating Officer advised the Government that he might require the OCAs' presence by telephone and asked the Government to have telephonic contact information available and to ensure that the OCAs were ready to testify by telephone. The Government agreed to do so. The Defense objected to this request and explained that it needed the OCAs to testify in person such that it could hand them various documents and exhibits. At this point, the Investigating Officer reverted back to his ruling that he would consider the unsworn statements in lieu of calling the OCAs to testify either telephonically or in person. The Investigating Officer considered the unsworn declarations of the OCAs and ultimately recommended that all charges be referred to a general court-martial.

15. On 12 January 2012, the Defense filed a Request for Oral Deposition with the Special Court-Martial Convening Authority (SPCMA). *See* Attachment N. On 16 January, 2012, the Defense filed another Request for Oral Deposition naming two additional OCAs. *See* Attachment O. On 18 January, 2012, the SPCMCA disapproved the Defense's request. *See* Attachment P. With respect to six of the OCAs (para. 2), the SPCMCA wrote, "The IO determined that the difficulty, expense and or/effect on military operations outweighed the significance of the expected testimony … There is no evidence that the witnesses will not be available for trial if their testimony is determined relevant and proper …". *Id.* With respect to Mr. Roland, the SPCMCA disapproved of the request because "The defense did not request Mr. Roland as an Article 32 witness. There is no evidence that the witness will not be available at trial if their testimony is determined relevant and necessary." *Id.*

16. On 23 January 2012, the Defense filed a Request for Oral Deposition with the General Court-Martial Convening Authority (GCMCA). *See* Attachment Q. On 1 February 2012, the GCMCA denied the Defense's request on virtually identical grounds. *See* Attachment R.

17. On 20 January 2012, the Defense filed with the Government a Discovery Request wherein it asked for complete contact information for various OCAs. *See* Attachment S. On 27 January, 2012, the Government responded that it would not provide contact information for the OCAs on the grounds that "the defense has failed to provide any basis for the request." *See* Attachment T.

18. The Defense was confused by the Government's refusal to provide contact information for the OCAs. The Defense knows that such information is readily available as the Government represented to the Investigating Officer that they would be prepared to contact the OCAs by

[4] Although the wording differed slightly with respect to each OCA, the thrust of the determination was identical.
[5] See Attachment M.

telephone during the Article 32. In response to the Government's refusal, the Defense sent an email to the Government reading, in part:

> I am a little confused by the government's response concerning contact information for Mr. Roland, [redacted], and Mr. Betz. Is it the government's position that even though you have ready access to the contact information for these potential witnesses, you will not provide this information to the defense? If so, can you elaborate on the basis for your denial to provide this information that is consistent with the requirements of Article 45, UCMJ? *See* Attachment U.

19. The Government responded:

> As for the contact information for Mr. Betz, [redacted] and Mr. Roland- All three are not currently identified as government witnesses. If they are identified as witnesses, then their contact information will be provided pursuant to the government's requirements under Article 46, UCMJ and relevant portions of the RCM. If this is not responsive, the defense is invited to renew its request with a more specific basis and the proper authority for receiving the contact information. *Id.*

20. The Defense wrote back:

> I am still confused by the government's refusal to provide contact information for Mr. Roland, [redacted], and Mr. Betz. At this point, it appears that the government is improperly impeding the defense's access to these potential witnesses. In discovery, the government provided the defense with an unsworn declaration from each of these potential witnesses. Additionally, you introduced these declarations into evidence at the Article 32, and were prepared to call each by telephone should the IO deem the unsworn declarations inadmissible. Therefore, the defense would like to interview Mr. Roland, [redacted] and Mr. Betz.
>
> The requirements of Article 46 are not dependent upon whether the government ultimately decides to list a particular individual on their witness list or not. Instead, it speaks to the right of the trial counsel, defense counsel, and court-martial to obtain witnesses and other evidence. Please provide contact information for Mr. Roland, [redacted] and Mr. Betz by1700 tomorrow. *Id.*

21. Again, the Government refused to provide contact information:

> At this time, we will not provide the contact information for Mr. Roland, [redacted], or Mr. Betz; however, if they are designated as government witnesses we will not only provide the information, but coordinate meetings for the defense to interview these senior level officials, and any other senior officials designated as government witnesses. These meetings will be well before trial so that each party has adequate opportunity to prepare its case and equal opportunity to interview witnesses.
>
> As of today, none of these three individuals will be witnesses at a court-martial, if the

case is referred. Although the United States intends to call senior military/government officials as witnesses, we have not identified these individuals as our witnesses. The United States understands its obligations under Article 46, UCMJ, applicable rules, and applicable case law, and is confident the defense will have equal opportunity to obtain witnesses, as defined by these sources and overseen by a military judge. *Id.*

22. The Defense then indicated that it "would like to explore the possibility of calling these individuals as defense witnesses. Please be so kind as to provide contact information for them. Thank you." On 1 February, 2012, the Government responded "Absolutely. We will start working with each organization to determine the best way for the defense to contact the individuals." *Id.* Over two weeks later, the Government has still not provided the Defense with the relevant contact information.

WITNESSES/EVIDENCE

23. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the referred charge sheet in support of its motion, as well as the Attachments referenced herein.

LEGAL AUTHORITY AND ARGUMENT

24. Although the stated purpose of depositions is generally to preserve the testimony of an unavailable witness, a deposition may be taken when there was an improper denial of a witness request at an Article 32 hearing or where the government has improperly impeded defense access to a witness. *See* R.C.M. 702(3)(discussion). *See also United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980); *United States v. Cumberledge*, 6 M.J. 203, 205, n. 13 (C.M.A. 1979); *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978); *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976). In this case, the original denial of the OCA witness request at the Article 32 was improper. Additionally, the Government has impeded the Defense's access to the OCA witnesses. Accordingly, the Defense requests that you order a deposition of the OCAs under R.C.M. 702.

25. The Defense has taken proactive steps – indeed, every step it possibly could – to protect the rights of PFC Manning. It asked for the OCAs to appear in person at the Article 32; it objected to the introduction of unsworn statements for consideration by the Investigating Officer; it requested from the SPCMCA and the GCMCA that it be permitted to depose the OCAs; it requested contact information for the OCAs from the Government. The Defense has "timely urge[d] [the accused's] pretrial rights" and thus requests that this Court order that the OCAs be deposed. *See United States v. Chuculate*, 5 M.J. 143, 145 (CMA 1978) ("Thus, if an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at trial.").

26. For over a year, PFC Manning's trial was delayed because the Government needed to obtain the appropriate classification reviews from the relevant OCAs. Time after time, the Government

hid behind the OCA approval process in denying Defense requests for discovery. Finally, a month before the Article 32, the Government secured all relevant OCA approvals and the court-martial process was able to begin.

27. When the Defense asked that the OCAs appear personally at the Article 32 so that the Defense could cross-examine them about their classification determinations, the Government balked. While the Government conceded they were relevant, it maintained that they were, in effect, too important to appear at an Article 32 hearing. The Investigating Officer agreed with the Government. He determined that the testimony of six of the seven OCAs was relevant but that the significance of the OCAs' expected testimony did not "outweigh the difficulty, expense and effect on military operations" so as to justify the OCAs' presence at the Article 32. *See* Attachment L. It is ironic that, after over a year of waiting for the OCAs to complete their important work, the OCAs' work was deemed not important enough to justify them personally appearing at the Article 32 hearing.

28. The Investigating Officer did not provide any support or reasons to buttress his conclusion that the OCAs were "not reasonably available." *United States v. Samuels*, 1959 WL 3613 (C.M.A.) (the investigating officer should set out the circumstances upon which the conclusion of the unavailability is predicated). Moreover, the Defense believes that the Investigating Officer's determination was not thoughtful and considered, but merely a rote recitation of the test for availability. This is supported by the fact that the Investigating Officer was completely "wishy-washy" on whether the OCAs would be required to testify. First, he determined two days before the Article 32 hearing that the OCAs were not reasonably available. At the hearing, he then suggested that the OCAs would be compelled to testify (and thus, were reasonably available – at least telephonically). He then reaffirmed that the OCAs were not reasonably available and that he would consider only their unsworn statements. This prevarication suggests that the Investigating Officer did not carefully weigh the relevant interests, but rather made his decision on a whim. It is illogical to think that a witness could be "not reasonably available" one day and then miraculously "reasonably available" another day.

29. The Government went to great pains to ensure that the unsworn statements of the OCAs were considered by the Investigating Officer. The Defense objected to the Government's proffer of unsworn statements as being in contravention of R.C.M. 405. The Investigating Officer, who had consistently made rulings in favor of the Government during the Article 32 process, was prepared to find the statements admissible even though they were in improper form. He determined that the statements were unsworn, but carried with them the same "indicia of reliability" as sworn statements. The Investigating Officer proceeded to consider the unsworn statements of the OCAs; as such, the Defense did not have an opportunity to cross-examine the OCAs at the Article 32. The Defense submits that given: a) the Government's extensive efforts to ensure that the Investigating Officer would consider the OCAs' unsworn statements and b) the Investigating Officer "bending over backwards" to ensure that he could consider such statements despite being proffered in an inadmissible form, the Defense should have an opportunity to depose these OCAs. The Government had the full benefit of having its evidence considered by the Investigating Officer, but none of the burdens (i.e. cross-examination). *See United States v. Cabrera-Frattini*, 65 M.J. 950 (N.M.Ct.Crim.App., 2008) (a deposition may be ordered to allow the defense an opportunity to cross-examine an essential witness who was not available at the

Article 32 investigation.); *United States v. Ledbetter,* 2 M.J. 37, 43 (C.M.A.1976) (an Article 32 investigation serves a twofold purpose as a discovery proceeding on behalf of the accused and as a means of establishing probable cause as a guard against the referral to trial of baseless charges).

30. After the Article 32, the Defense filed two Requests for Oral Depositions with the SPCMCA and the GCMCA. Both were denied. Both conceded that the testimony was relevant but deferred to the Investigating Officer's determination that the difficulty, expense and or/effect on military operations outweighed the significance of the expected testimony. Both the SPCMCA and the GCMCA indicated that there was no evidence that the witnesses would not be available for trial if deemed relevant and proper. The Defense had now faced four perfunctory denials of its requests to cross-examine or depose the OCAs.

31. While all concede that the testimony is relevant, all make blanket assertions that the difficulty, expense and or/effect on military operations outweighs the significance of the expected testimony. Essentially, the Investigating Officer adopted the Government's conclusory assertion that each OCA was "not reasonably available for the Article 32 given his position as …". *See* Attachment E at pp. 9-10. In turn, the SPCMCA adopted the Investigating Officer's conclusory assertion that "the difficulty, expense and or/effect on military operations outweighs the significance of the expected testimony." *See* Attachment L. In turn, the GCMCA adopted the Investigating Officer and the SPCMCA's conclusory assertion that "the difficulty, expense and or/effect on military operations outweighs the significance of the expected testimony." *See* Attachment R. Such unquestioning reliance on bald assertions of unavailability is improper. *See United States v. Cumberledge*, 6 M.J. 203, 205 (C.M.A. 1979) (accepting defendant's argument that military judge erred in "adopting the reasoning of the staff judge advocate …. and the Article 32 investigating officer on the question of the availability of [2 witnesses] for the Article 32 hearing … [T]he evidence demonstrates that the Government … [had] sufficient funds and the ability to secure these witnesses' presence at the Article 32 hearing …").

32. No one has provided any explanation as to *why* or *how* the burdens of testifying at an Article 32 or at a deposition outweigh the relevance of the testimony. The Defense has simply had to rely on the say-so of the Government, which was wholesale adopted by the Investigating Officer, and which, in turn, was wholesale adopted by the SPCMCA and the GCMCA. In *United States v. Chestnut*, 2 M.J. 84 (CMA 1976), the Court of Military Appeals criticized the investigating officer and trial judge for using "assumptions of [the] witness' availability, rather than [requiring] evidence demonstrating circumstances or exigencies warranting the excusal of [the witness] from the Article 32 hearing."

33. The Defense would like to question the OCAs about materials that they prepared in response to this case and apparently are prepared to stand by.[6] How difficult can it be to answer questions that test the basis of a statement that one has made under penalty of perjury? Presumably, prior to submitting such a statement, an OCA would have a very good grasp of all the issues contained therein. Moreover, what is the "expense" involved? The cost of transportation? Surely in a case of national importance, the cost of a few flights is not too much for the U.S. government to bear.

[6] The Defense takes this to be the logical corollary of the Government's position that the unsworn statements are actually sworn statements because they are made under penalty of perjury.

Finally, how are military operations significantly impacted by requiring an OCA to answer questions about his unsworn statement? It is hard to believe that military operations would suffer by having an OCA take a few hours – or at most a day – out of his schedule. *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976) ("In addition, there was no showing that military exigencies or other extraordinary circumstances warranted excusal of the witness, who was subject to military orders.").

34. It seems that the Government, the Investigating Officer, the SPCMCA and the GCMCA keep on passing the buck and saying that the Defense can examine these witnesses "later." "Later" is now. The Defense should not be in a position where it is speaking with the OCAs for that first time at trial.

35. In an effort to reach out to some of the OCAs on its own, the Defense requested their contact information. The Government, despite having this contact information readily available, refused to provide it to the Defense. The Government's position appeared to be that because, at this point in time, the Government was inclined not to call the OCAs as witnesses, it would not share their contact information with the Defense. The Defense finds this position illogical and indefensible. The Defense's ability to speak to a relevant witness does not ebb and flow in conformity with the whims of the Government. *See United States v. Killebrew*, 9 M.J. 154, 159 (C.M.A. 1980) ("... the record of trial here reveals that the rights of the [defendant] were not adequately safeguarded. McElroy was clearly a potential witness for the prosecution. Even in the last communication to defense counsel, the trial counsel recognized [that fact]").

36. The Government has signaled that these OCA determinations are critically important – both by virtue of the time expended obtaining them over the year, and the effort to ensure that they were considered by the Investigating Officer (even in improper form) at the Article 32. The Government cannot now "change its mind" and downplay the significance of these determinations.

37. When the Defense indicated that it might consider calling the OCAs as witnesses for the Defense, the Government then "absolutely" agreed to provide the contact information. It is two weeks later, and the Defense still does not have any of the three phone numbers. *United States v. Cumberledge*, 6 M.J. 203, 205 n. 13 (C.M.A. 1979) ("it is nevertheless incumbent upon the Government to provide the defense counsel with *timely* and *meaningful* access to the witnesses.")(emphasis in original). The Defense believes that the Government has been improperly impeding the Defense's access to these witnesses, to the point where the Government reflexively and repeatedly refused to provide contact information. It has certainly not provided either "timely" or "meaningful" access to the OCAs.

V. RELIEF REQUESTED

38. Accordingly, pursuant to the Rules for Courts-Martial (R.C.M.) 702(c)(2), the Defense requests that an oral deposition of the above-listed OCAs be conducted prior to trial.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel